

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F412890

DARRYL MELVIN,  
EMPLOYEE

CLAIMANT

ACTION WELDING & FABRICATION,  
EMPLOYER

RESPONDENT

FIRSTCOMP INSURANCE CO.,  
INSURANCE CARRIER

RESPONDENT

**OPINION FILED MAY 22, 2006**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Mountain Home, Baxter County, Arkansas.

The claimant was represented by HONORABLE FREDERICK S. SPENCER, Attorney at Law, Mountain Home, Arkansas.

The respondents were represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on March 1, 2006 in Mountain Home, Arkansas. A prehearing order was entered in this case on September 1, 2005. This prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties in the prehearing order and are hereby accepted:

1. The Employer-Employee-Carrier relationship existed on July 15, 2003 and at all pertinent times hereto.
2. The claimant was earning an average weekly wage of \$420.00, which entitled him to benefit rates of \$280.00/\$210.00.
3. This claim has been controverted in its entirety.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Administrative Law Judge's recusal.
2. Constitutionality of the Arkansas Workers' Compensation law.
3. Compensability of injury sustained on July 15, 2003.
4. Controverted attorney fees.
5. Reasonable and necessary medical treatment.

The record consists of the two volume March 1, 2006 hearing transcript and the exhibits contained therein.

#### **DISCUSSION**

##### **1. Motion to Recuse and Constitutional Issues**

The claimant challenges the constitutionality of this administrative law judge and all administrative law judges

and the Commissioners conducting hearings and deciding claims for compensation. The claimant generally asserts that claims being decided by the Arkansas Workers' Compensation Commission, being a part of the Executive Branch of Government, violates the Due Process Clause of the United States and the Arkansas Constitution, violates Ark. Const. Art. 4, §§ 1 and 2; Ark. Const. Art. 5, § 32; Ark. Const. Art. 2, §§ 2 and 3; Ark. Const. Art. 2, § 18; and Ark. Const. Art. 2, § 29. The claimant's motion to recuse alleges that all of the administrative law judges appear tainted with potential bias, prejudice, and impropriety, and a financial interest in the outcome of the claimant's constitutional challenge. The claimant did not request a hearing on the motion to recuse.

The Arkansas Workers' Compensation Commission adopted recusal guidelines for its administrative law judges by memorandum dated April 7, 2003. Under these guidelines, a judge shall hear cases assigned to the judge except when disqualification is required. A judge shall disqualify himself in cases where the judge's impartiality might reasonably be questioned, including but not limited to instances where (1) the judge has a personal bias or prejudice concerning a party or lawyer, including personal

knowledge of disputed facts; (2) the judge knows that he has anything more than a de minimis interest that could be substantially affected by the proceeding; or (3) the judge or a family member is a party to the proceeding, is a lawyer in the proceeding, has more than a de minimis interest in the proceeding, or is likely to be a material witness in the proceeding.

Members of administrative agencies that perform quasi-judicial functions are also required to follow the disqualification rules provided in the Arkansas Code of Judicial Conduct. Acme Brick Co. v. Missouri Pacific R.R., 307 Ark. 363, 821 S.W.2d 7 (1991). The Arkansas Code of Judicial Conduct contains essentially the same disqualification rules adopted by the Commission in 2003. See generally, Ark. Code of Judicial Conduct Canon 3.

In the present case, I, like the other administrative law judges and the Commissioners at the Commission, may have personal knowledge regarding the truth or falseness of at least some of the allegations contained in the affidavits offered in support of the claimant's motion to recuse. In addition, as mentioned above, the claimant's motion alleges that all of the administrative law judges appear tainted with potential bias, prejudice, and impropriety, and notes

that the Commission's administrative law judges all have a potential pecuniary interest in the outcome of the claimant's constitutional claims.

The claimant's general allegations notwithstanding, I note that the claimant does not allege that I would be called to testify as a witness on his constitutional challenge in this case. I have no personal knowledge about the claimant, the respondent or the attorneys, outside of any information made known to me in my capacity as an administrative law judge, and I have no basis to conclude that I might be biased or prejudiced against any party or attorney in this pending claim.

To the extent that the claimant has alleged potential bias, prejudice, impropriety, and a pecuniary interest with respect to all administrative law judges employed at the discretion of the Commission in the Executive Branch of State Government, I respectfully point out that the claimant's recusal argument in this case appears to present the special circumstances requiring application of the rule of necessity discussed by the Arkansas Supreme Court in Acme Brick Co. v. Missouri Pac. R.R., 307 Ark. 363, 821 S.W.2d 7 (1991), where the Court explained:

Under the doctrine or rule of necessity, it has been held that administrative officers or bodies are not disqualified because of bias, prejudice, or prejudgment of the issues where they alone have the power and authority to act and where, if they are disqualified, action cannot otherwise be taken, particularly where a failure of justice would result if they are not permitted to act....

Id. quoting 73 C.J.S. Public Administrative Law and Procedure 61(b) (1983). In Acme Brick Co., the Supreme Court concluded that an appearance of bias in fact existed where an attorney representing one of the parties in litigation before the Arkansas Highway Commission was simultaneously representing the Commission and its members in two pending lawsuits. The Supreme Court nevertheless determined that the rule of necessity overrode the rule of disqualification under circumstances where the law failed to provide a procedure for the appointment of special Highway Commissioners to hear the case.

Similar to Acme Brick Co., supra, the claimant in the present case has failed to indicate how the current administrative law judges at the Commission might legally be replaced by a temporary administrative law judge appointee assigned the task of determining the claimant's constitutional challenge, nor am I aware of any such procedure. The law clearly does provide for appointment of

special Commissioners. See Ark. Code Ann § 11-9-201.

However, I note that special Commissioners are appointed by the Governor under current law, and I note that it is the appointment or hiring of quasi-judicial officials through the Executive Branch of Government which forms the basis of the claimant's constitutional challenge. Therefore, even if the claimant's allegation of potential bias, prejudice, impropriety and/or pecuniary interest involving all of the administrative law judges had merit, as the claimant asserts, it appears to me that the rule of necessity would override the claimant's request for disqualification of the Commission's administrative law judges as a group.

Finally, I note that the claimant's attorney raised, and the Full Commission rejected, essentially identical constitutional and recusal arguments in the following decisions: Long v. Wal-Mart, Full Workers' Compensation Commission, Opinion filed January 25, 2006 (F309931); Edwards v. Galloway Sand & Gravel, Full Workers' Compensation Commission, Opinion filed October 11, 2005 (F109737); Plummer v. Wal-Mart, Full Workers' Compensation Commission, Opinion filed October 10, 2005 (F209057); Bland v. Baxter Regional Medical Center, Full Workers'

Compensation Commission, Opinion filed August 16, 2005 (F204378).

Since the claimant's motion has not alleged any personal bias, prejudice, or impropriety on my part, but instead only alleges potential bias, prejudice, impropriety, and financial interest on the part of all administrative law judges at the Workers' Compensation Commission, and since the claimant has failed to cite any legal mechanism for assigning a replacement administrative law judge to conduct a hearing on the claimant's constitutional arguments, I find that the claimant's motion for recusal must be denied under the rule of necessity. Furthermore, since the Full Commission has previously considered and rejected the claimant's same constitutional and recusal arguments in prior published decisions, I find that the claimant's request that I recuse in order to avoid rendering a decision on her constitutional challenge is moot. Based on the factual and legal conclusions of the Full Commission in the cases cited in the previous paragraph, I find that the claimant's constitutional challenge is without merit.

## **2. Evidentiary Objection**

On page 52 of the hearing transcript, the claimant's attorney objected to the respondents' attorney's question

regarding the outcome of a previous workers' compensation claim that Mr. Melvin had filed regarding a back injury. The claimant's attorney objected on grounds of relevance. However, I note that the claimant's attorney offered into evidence Mr. Melvin's April 18, 2005 deposition, and I also note that the prior workers' compensation claim for a back injury was discussed at length on page 21-23 of the deposition transcript. Under these circumstances, I find that the claimant's testimony in his deposition renders moot the claimant's attorney's objection on relevance grounds to similar questions during the March 1, 2006 hearing.

**3. Compensability of the Claimant's Heart Attack Sustained on July 14, 2003 and/or July 15, 2003**

With regard to establishing the compensability of heart or cardiovascular injuries, Ark. Code Ann. § 11-9-114 provides:

(a) A cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death is a compensable injury only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm.

(b) (1) An injury or disease included in subsection (a) of this section shall not be deemed to be a compensable injury unless it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment

or, alternately, that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm.

(2) Stress, physical or mental, shall not be considered in determining whether the employee or claimant has met his or her burden of proof.

In the present case, Mr. Melvin became employed as a laborer and a welding fire watcher for Action Welding & Fabrication in approximately June of 2003. Mr. Melvin and welder Jamie Baker went to work for Action Welding & Fabrication together. Previously, Mr. Melvin and Mr. Baker worked together for Ozark Fabrication. Both Ozark Fabrication and Action Welding & Fabrication are contractors who perform work at the large Baxter Laboratories facility near Mountain Home, Arkansas.

Mr. Melvin contends that he sustained a work related heart attack while engaged in labor on the hot roof of the Baxter Laboratories facility on July 14, 2003 and on July 15, 2003. In his April 18, 2005 deposition, Mr. Melvin testified that what was so unusual or extraordinary about those two days, was that it was hotter than normal for the Mountain Home area. [Cl. Exh. 3, p. 46]. Mr. Melvin testified that based on the materials used on the roof in combination with the heat of the reflection, the temperature was 120 or 125 degrees on the roof without considering the

humidity. [Id.]. Mr. Melvin testified that he had never previously been in any job where he was in that much heat doing that much work for two days. [Cl. Exh. 3, p. 44]. Mr. Melvin testified that Mr. Melvin told Mr. Baker on July 14, 2003, that Mr. Melvin was feeling light headed, and Mr. Melvin testified that both Mr. Melvin and Mr. Baker were complaining about the heat on July 14, 2003. [Cl. Exh. 3, p. 32]. Mr. Melvin testified that he did not have time to drink any water at work on July 14, 2003, and he was sure that he got very dehydrated that day. [T. p. 51].

In considering the weight to accord Mr. Melvin's testimony that he was never in that much heat doing that much work for two days previously, I note there is no dispute that Mr. Melvin did not start work on July 15, 2003 until 7:30 a.m., and he was admitted to the hospital that morning at approximately 8:15 a.m., only 45 minutes after starting work that day. Furthermore, meteorological data entered into evidence indicates that area temperatures between 7:30 a.m. and 8:15 a.m. that morning were 75 to 79 degrees. [R. Exh. 3, p. 13].

In considering the weight to accord the claimant's description of the heat on July 14, 2003, I note that Jamie Baker testified that he recalled the weather was hot that

day, and that if a person were on the roof very long, a person would start sweating. Mr. Baker also testified, however, that they had a five gallon water cooler. [T. 17]. Mr. Baker also testified that, most of the time, if there is any breeze at all, they would feel it. [T. 13]. Meteorological data from July 14, 2003, indicates that the high temperature that day was 91 degrees, that the temperature remained below 90 degrees until approximately 3:00 p.m., and that the area experienced a breeze continuously between 10:00 a.m. and 8:00 p.m. which, according to the graph introduced into evidence, blew between 3 and 7 miles per hour. [R. Exh. 3, p. 6].

In considering the claimant's testimony regarding his perceived dehydration on July 14, 2003 as a possible contributory factor to his heart attack, I note that Dr. Araneda, the claimant's treating cardiologist at the hospital on July 15, 2003, testified that if a worker became dehydrated one day, then came back to work in a state of dehydration the next day, the further stress of more dehydration could be a trigger for the event causing a myocardial infarction. [R. Exh. 1, p. 37]. However, after reviewing Mr. Melvin's hospital blood work, Dr. Araneda testified that he did not see any evidence that Mr. Melvin

was dehydrated when Mr. Melvin presented to the hospital on July 15, 2003. [R. Exh. 1 pg. 37].

In Huffy Service First v. Ledbetter, 76 Ark. App. 533, 69 S.W.3d 449 (2002), the Court affirmed a Commission decision that on the day of Mr. Ledbetter's heart attack, the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual. The Commission and the Court reached this result under circumstances where (1) Mr. Ledbetter was assembling lawn tractors outside, without ventilation, with the heat index over 100 degrees, perspiring so heavily his clothes frosted from salt, ultimately requiring hospitalization, and where (2) he did not work under such extreme conditions in the normal course of employment.

In Ulibarri v. Jim Wood Company, Inc., 79 Ark. App. 354, 87 S.W.3d 846 (2002), the Court affirmed a Commission decision that in Mr. Ulibarri's case, the exertion of the work that he was performing on the day of his heart attack was not extraordinary and unusual compared to his usual work. In distinguishing the facts in the case from Ledbetter, the Court noted that both decedents were working on hot days at the time of their heart attacks, both were working in a space enclosed by two walls that prevented air

from circulating, and both had previously performed similar work under similar conditions. However, the Court noted that the temperature on the morning of Mr. Ulibarri's death was 86 degrees, whereas the high reached between 103 and 105 degrees on the day of Mr. Ledbetter's death, it was very unusual for Mr. Ledbetter to be working outside when the temperature reached 100 degrees, and on the day of his heart attack, Mr. Ledbetter's work load for assembling tractors was thirty, and his normal assembly was fifteen to twenty tractors.

By comparison, in the present case, the temperature on July 14, 2003 reached only 91 degrees, a breeze was blowing, and Mr. Baker's testimony persuades me that a breeze could be felt on the roof, and that drinking water was available to Mr. Baker and to Mr. Melvin. Mr. Baker's testimony also persuades me that the frequency at which Mr. Baker and Mr. Melvin worked on the roof in the middle of the summer was determined by whether or not a job on the roof needed to be done. [T. 11]. Finally, unlike in Ledbetter, the claimant's work load on July 14, 2003 and on July 15, 2003 was not established to exceed his normal work load on any other day. Consequently, I find that the claimant has failed to establish by a preponderance of the credible

evidence that the exertion of his work on either July 14, 2003 or on July 15, 2003 was extraordinary or unusual.

On this record, I also find that the claimant has failed to establish by a preponderance of the evidence that his work was the major cause of his heart attack. In reaching this conclusion, I recognize that Dr. Richard Burnett, a family practitioner, opined on February 11, 2005 that Mr. Melvin's acute inferior myocardial infarction in July of 2003 was triggered by physical exertion prior to the infarction. However, Dr. Burnett has failed to indicate the circumstances conveyed to him which led to his opinion on causation.

Dr. Araneda, the claimant's treating cardiologist at the hospital, opined to the contrary. During the course of his February 8, 2006 deposition, Dr. Araneda testified that there was no information that he had been provided about the claimant's job indicating that the myocardial infarction was brought on by Mr. Melvin's work. [R. Exh. 1, p. 25]. After Mr. Spencer ably augmented the history provided to Dr. Araneda with a hypothetical consistent with the claimant's later hearing testimony, Dr. Araneda testified that he had been provided no additional information during his deposition that would change his opinion. [R. Exh. 1, p.

51]. Dr. Araneda's testimony persuades me that the claimant's work was not the major cause of his July 15, 2005 heart attack.

In reaching my conclusions about Dr. Araneda's opinion, I note that the causation question in this case potentially involves several cardiac risk factors: a family history of heart disease, smoking, and high cholesterol. [R. Exh. 1, p. 10]. In addition, the claimant has a history of a coronary artery occlusion and a heart attack in 1980 at the age of 30. In 1989, the claimant had multiple occlusions and a triple bypass surgery. The claimant had occlusions in a veinous graft with treatment in 1998, 2000, and 2003. Clearly, a history of heart disease is not determinative of the causation question. See Williford v. City of North Little Rock, 62 Ark. App. 198, 969 S.W.2d 687 (1998). However, that history appears to be relevant to Dr. Araneda's opinions on causation, and in light of Mr. Melvin's complicated coronary history, I accord greater weight to the opinion of his treating cardiologist than the weight I accord the opinion of a family practitioner on the cause of the claimant's 2003 heart attack.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Employer-Employee-Carrier relationship existed

on July 15, 2003 and at all pertinent times hereto.

2. The claimant was earning an average weekly wage of \$420.00, which entitled him to benefit rates of \$280.00/\$210.00.

3. This claim has been controverted in its entirety.

4. The claimant has failed to establish by a preponderance of a credible evidence that the exertion of his work on July 14, 2005 and/or July 15, 2005 was extraordinary and unusual in comparison to his usual work in the course of his regular employment.

5. The claimant has also failed to establish that his work on July 14, 2003 and/or on July 15, 2003 is the major cause of his heart attack at issue.

6. The claimant has therefore failed to establish that he sustained a compensable heart or cardiovascular injury.

**ORDER**

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge